

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**PREUSSAG INTERNATIONAL STEEL
CORPORATION, d/b/a INFRA-METALS, CO.**

VS.

**MARCH-WESTIN CO., INC.; TITAN FABRICATION &
CONSTRUCTION, INC.; ZURICH AMERICAN INSURANCE CO.;
and FIDELITY AND DEPOSIT COMPANY OF MARYLAND**

Supreme Court No. 33286

**BRIEF AMICUS CURIAE OF THE CONTRACTORS ASSOCIATION OF WEST
VIRGINIA IN SUPPORT OF DEFENDANTS
MARCH-WESTIN CO., INC.,
ZURICH AMERICAN INSURANCE CO., and
FIDELITY AND DEPOSIT COMPANY OF MARYLAND**

Upon Certified Question
From The United States District Court
For The Northern District Of West Virginia
(Clarksburg Division)

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of West Virginia:

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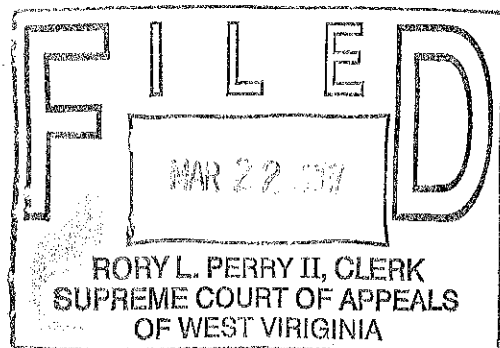


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II. INTEREST OF AMICUS CURIAE

The Contractors Association of West Virginia ("CAWV") is a West Virginia corporation that represents roughly 450 members employing more than 20,000 people in the construction industry in West Virginia. CAWV members, including March-Westin Co., Inc. ("March-Westin"), bid upon and act as general contractors in the construction of projects such as the one at issue in this litigation. CAWV members also include subcontractors, suppliers, materialmen and associates who provide construction services or supplies on such projects.

This Court's decision in this proceeding will necessarily impact the construction and bonding industries' policies, practices and procedures with respect to the working relationships among contractors, subcontractors, suppliers, and sureties. Moreover, the Court's decision could have far-reaching adverse ramifications on the construction industry from a financial standpoint, as well as on the means and methods by which construction projects are undertaken. The CAWV thus has a substantial interest in the outcome of this proceeding and therefore respectfully submits this *amicus curiae* brief for the Court's consideration.

III. KIND OF PROCEEDING AND NATURE OF RULING IN THE UNITED STATES DISTRICT COURT

By order entered January 10, 2007, this Court accepted the certified question submitted by the United States District Court for the Northern District of West Virginia by its "Order of Certification to the Supreme Court of Appeals of West Virginia" entered October 27, 2006.

The certified question of law to be answered was formulated by the District Court as follows:

Under West Virginia Code § 38-2-39 (2003), is a steel fabricator deemed to be a "subcontractor" where:

- A. **The steel fabricator enters a fixed-price contract with the general contractor of a public works construction project, pursuant to which the fabricator**
 - i. Agrees to fabricate and deliver structural steel components conforming to the construction project's unique design specifications;
 - ii. Produces shop drawings for the fabricated steel components based on the project's engineering calculations and design specifications;
 - iii. Submits its shop drawings for approval by the project's architect and general contractor before fabricating the structural steel components; and
 - iv. Delivers the fabricated steel components on a delivery schedule based on construction progress;
- B. **The steel fabricator performs all physical fabrication processes at its own facility, away from the project site; AND**
- C. **The fabricated steel components are not fungible and not readily marketable without further modification?**

IV. FACTUAL BACKGROUND

March-Westin was the general contractor on a public works project involving the construction of a student activities center at Fairmont State College. The contract to build the

center was entered into on November 4, 2003. The project was secured by a Labor and Material Payment Bond issued by Zurich American Insurance Co. and Fidelity and Deposit Company of Maryland.¹

As part of the work on the project, March-Westin entered into a "Purchase Order" agreement with Titan Fabrication & Construction, Inc. ("Titan") to provide fabricated steel. Titan, in turn, obtained steel from Infra-Metals, Co. When March-Westin's supplier, Titan, failed to pay *its* supplier, Infra-Metals, the latter sought payment from March-Westin by filing a claim against March-Westin's payment bond. Thus, a supplier to a supplier sought payment under the contractor's bond.

The question before this Court is whether a material supplier like Titan, whose work took place entirely at its own facility and consisted solely of supplying fabricated steel to the job site, should be considered a subcontractor for the purposes of W.Va. Code § 38-2-39, the public works bond statute. The CAWV urges this Court to answer the certified question in the negative, adopt the positions advocated by March-Westin and the surety companies, and hold that material suppliers are not subcontractors for this purpose.

¹ In an effort to reduce the Court's burden and avoid duplication, no evidentiary documents are attached to this brief. All such documents may be found as exhibits to Appellees March-Westin's and the sureties' brief and are incorporated herein by reference.

V. ARGUMENT

A. Industry standard distinguishes “subcontractors” from “suppliers.”

Although some jurisdictions have determined that suppliers may be deemed subcontractors for certain purposes,² the normally accepted industry standard distinguishes the two for all purposes, including bonding. In the construction industry, a subcontractor is typically perceived and defined as one who performs work *on-site* as part of the construction process. While a subcontractor may also supply materials as part of its work, the defining element is that the subcontractor works *at* the construction site. On the other hand, those who provide equipment or materials, regardless of whether those materials are altered in accordance with contract specifications, are defined as “suppliers.”³

The industry standard definition of subcontractor is further evidenced by the standard contract forms created by the American Institute of Architects (“AIA”) and the Engineers Joint Contract Documents Committee (“EJCDC”). The AIA represents the professional interests of architects and currently provides over 100 forms and contracts for use in design and construction projects. AIA has developed these documents over the past 115 years and its contracts and forms are now widely recognized as the industry standard.⁴ The EJCDC has existed since 1975 for the primary purpose of producing quality contractual documents for use on construction projects involving professional engineering services.⁵ AIA and EJCDC form contract documents

² See e.g., *Western Sash & Door Co. v. Buckner*, 80 Mo. App. 95 (1899) (finding “subcontractor” may mean either “laborer,” “materialman” or both); *Jackson v. Egan*, 94 N.E. 211 (N.Y. 1911) (finding suppliers of materials by way of a direct contract with the owner to be contractors).

³ Suppliers are also sometimes referred to as “materialmen.”

⁴ See http://www.aia.org/docs2_template.cfm?pagename=docs%5Fabout&defPr=1, last visited March 13, 2007.

⁵ See <http://www.agc.org/page.wv?section=EJCDC+Contracts&name=About+Engineers+Joint+Contract+Documents+Committee>, last visited March 14, 2007.

are the most used contracts in the construction industry; even when the form contract itself is not used, owners, architects, contractors and engineers typically use the contract language found in these forms as the basis for their contracts.

The AIA A-401-1997 is the standard form agreement between a contractor and subcontractor and incorporates the A-201-1997, the "General Conditions of the Contract for Construction."⁶ Article 5 of the A-201 defines a subcontractor as "a person or entity who has a direct contract with the contractor to perform a portion of the Work *at the site*." AIA A-201, § 5.1.1 (emphasis added).

The EJCDC also produces a "Standard General Conditions of the Construction Contract" that defines both "subcontractor" and "supplier."⁷ A subcontractor is defined as "[a]n individual or entity having a direct contract with Contractor or with any other Subcontractor for the performance of a part of the Work *at the Site*." EJCDC General Conditions, § 1.01, ¶ A.42 (emphasis added).⁸

A supplier, on the other hand, is "[a] manufacturer, *fabricator*, supplier, distributor, materialman, or vendor having a direct contract with Contractor or with any Subcontractor to furnish materials or equipment to be incorporated in the Work by Contractor or any Subcontractor." EJCDC General Conditions, § 1.01, ¶ A.45 (emphasis added).

⁶ See AIA A-401-1997, *Standard Form of Agreement Between Contractor and Subcontractor*, § 1.2, and AIA A-201-1997, *General Conditions of the Contract for Construction*, both prepared by the American Institute of Architects (1997 ed.), attached hereto collectively as Exhibit "A" ("A-401" and "A-201," respectively).

⁷ See "Standard General Conditions of the Construction Contract," prepared by the Engineers Joint Contract Documents Committee (1996 ed.), attached hereto in pertinent part as Exhibit "B" ("EJCDC General Conditions").

⁸ "Site" is defined as "[l]ands or areas indicated in the Contract Documents as being furnished by Owner upon which the Work is to be performed . . . and such other lands furnished by Owner which are designated for the use of the Contractor." EJCDC General Conditions, § 1.01, ¶ A.40.

Accordingly, as evidenced by the form contract documents used throughout the industry, a subcontractor is uniformly defined as one who *performs work at the site* of the project, as opposed to a supplier who simply supplies materials *to* the site and does no work on-site.⁹ Moreover, the EJCDC *specifically* includes fabricators in its definition of "supplier," negating any inference or proposition that preparation or fabrication of materials off-site somehow elevates a supplier to the status of subcontractor. As such, the industry standard not only distinguishes suppliers from subcontractors, but in so doing, excludes fabricators and other like suppliers from the status of subcontractor. There is nothing about the operation of the public works bond statute that would justify any divergence from the well-settled and easily understood distinction in place in the industry.

B. Deeming Titan a subcontractor for purposes of W.Va. Code § 38-2-39 will have far-reaching adverse consequences in the construction and bonding industries.

If a supplier like Titan, the steel fabricator here, is deemed a subcontractor for the purposes of the bond statute, the construction and bonding industries will be detrimentally affected in a number of ways. Suppliers with direct relationships with the contractor or a subcontractor are already provided for under the public works bond statute by virtue of their relationship to the contractor or subcontractor. However, the statute severs any continuation of that coverage at the first-tier supplier level, as is absolutely necessary to prevent a potentially unending chain of liability under the bond that could extend to every participant in the construction process. If every downstream supplier may be deemed a subcontractor for purposes

⁹ Notably, the contractor on this project used AIA contract documents, particularly with respect to its agreements with subcontractors.

of the bond, it would call into question well-settled issues and expectations within the industry regarding the relationships among contractors, subcontractors, suppliers, and their bonding companies.

As a general premise, all of the effects of deeming suppliers to be subcontractors would likely result in increased costs and practical burdens to the owners who engage the construction industry, to contractors and subcontractors, and even to suppliers themselves. Deeming suppliers to be subcontractors would also negatively impact the bonding industry. The ways in which these industries would be adversely affected are numerous; a sampling of these effects follows.

1. Effect on the Bonding Industry and its Processes

One primary adverse effect is that which will be suffered by the bonding industry itself. If any supplier who sells or delivers a product to a construction site is deemed a subcontractor and is therefore entitled to stand-alone coverage under the performance and payment bond requirements (as opposed to coverage by virtue of a direct relationship with a contractor or subcontractor), the coverage provided by construction bonds may extend to virtually every company, firm, entity, or individual who in any way provides any material item to anyone for incorporation in a project. The bright line so long depended upon will be blurred to extinction.

Currently, by law, construction and bonding industry custom, and well-understood legal principles, a contractor is on notice, and is responsible for, two tiers of liability under the bond – to 1) its own direct suppliers and its subcontractors, and 2) the direct suppliers of its subcontractors. However, if every supplier is deemed a subcontractor, or even if a supplier must

only perform some alteration of the materials to qualify as a subcontractor, the chain of liability could logically be extended through every tier of supply, potentially all the way to the manufacturers. This deviation from industry practice would likely result in 1) exponentially increasing the pool of potential claimants who could file claims against payment bonds; 2) decreased access to and increased rates of surety bonds; 3) increased litigation arising from claims filed against payment bonds; and 4) increased risk of liability and increased administrative burden for contractors attempting to manage the increased risk.

Due to the higher risk of exposure to sureties, the number of sureties willing to bond construction projects may decrease. All of these factors taken together would most likely result in the overall costs of payment bonds, including bond premiums, and the complexity of the bonding process increasing significantly. To the extent payment bonds remain available, the cost – in time and money – of obtaining them will likely increase, an increase that will be passed down through the construction chain resulting in increased costs of construction on all projects, not the least of which would be public works projects.

2. The construction industry will identify suppliers as subcontractors for all purposes, not solely bonding purposes.

If a supplier is to be deemed a subcontractor for *any* purpose, it can be expected that contractors will, out of necessity and for their own contractual protection, bind suppliers to a subcontract (rather than a purchase order, as is standard now), thus making the supplier a subcontractor for *all* purposes.¹⁰ The resulting erosion of the differences between subcontractors

¹⁰ There is no dispute that a purchase order is a type of contract. However, the difference between a purchase order agreement, which is typically only a few pages imposing relatively minimal obligations on the supplier, and a subcontract, a lengthy document addressing virtually all aspects of the contractual relationship between the parties, creates a significantly different set of expectations, requirements, and obligations that must be met by suppliers, as opposed to those

and suppliers would create a confusing environment for all parties to the construction process and would charge suppliers with significant additional burdens detrimental not only to the suppliers' businesses, but also to the contractors and subcontractors to whom they provide materials.

a. Possible changes to Suppliers' modes of operation

As discussed previously, subcontractors and suppliers are categorized and treated differently in the construction industry. If suppliers became subcontractors, their overall business situations and modes of operations could be altered by virtue of the contractors' need to treat them as subcontractors for all purposes. Some examples include:

- 1) suppliers would be expected to execute an AIA or similar subcontract agreement, rather than the relatively simplistic purchase order agreements they use now;
- 2) suppliers could arguably become subject to prevailing wage mandates;
- 3) suppliers charge sales tax but as subcontractors, would not;
- 4) suppliers need only provide the materials on time and in accordance with the contract specifications; subcontractors are normally subject to worksite rules, safety mandates, and other worksite requirements;
- 5) suppliers would be required to provide a valid contractors license as subcontractors currently do;
- 6) suppliers would be required to provide proof of workers' compensation coverage (or an exemption certificate) as subcontractors currently do; and
- 7) suppliers would be required to execute lien waivers as subcontractors currently do; and in some cases, subcontractors also have their vendors execute them prior to receiving payment.

imposed on subcontractors. See, e.g., Section B.2.b., *infra*.

Particularly compelling of the examples above is that of the prevailing wage requirements. West Virginia Code sections 21-5A-1, *et seq.* (2007) require that contractors and subcontractors on public works projects pay a wage to all workers employed on a project that is no less than the prevailing hourly rate of wages for work of a similar character in the locality. This "prevailing wage" may exceed minimum wage, as well as the wage earned by many "line" and other workers in a supplier's manufacturing shop.

If suppliers are deemed subcontractors, they should be subject to the same West Virginia prevailing wage requirements as all other subcontractors on the project, even those suppliers who are based in other states. It is unlikely that suppliers would desire this additional condition of participation in West Virginia construction projects. Moreover, these requirements could be passed all the way down the chain of suppliers, all of whom could presumably claim subcontractor status, including all manufacturers of materials used on a construction project.

If suppliers are considered subcontractors, these situational differences will have to be somehow addressed by the parties to the construction process. It could be argued that these requirements should simply be negotiated and addressed in a subcontract between the contractor (or subcontractor) and supplier; however, that is not a simplistic remedy. The fact remains that the issues would have to be negotiated *each time* an order for materials is placed. Under those circumstances, every time a contractor or subcontractor needs to purchase materials, a subcontract would have to be formulated to provide for all of the many contingencies related to the contractor/subcontractor relationship. Rather than simply issuing a purchase order, as is the current practice, the parties will need to address the many varying aspects of the relationship in

more complex, time-consuming legal documents that delegate more costly practical ramifications.

The potential adverse effect on the construction industry is significant – without the ease of purchase orders, projects could be delayed or brought to a grinding halt. The inability to obtain materials quickly, as needed; would lead to an impractical and unreasonable waste of time, money, and effort, with no true benefit to any of the participants in the construction process. Because the imposition of these requirements would significantly alter the way suppliers do business, these additional burdens may dissuade suppliers from participating in construction projects in West Virginia. Obviously, any loss of suppliers would detrimentally affect the ability of contractors to complete projects, particularly where the suppliers of certain materials are limited. Accordingly, as noted above, suppliers may be less likely to do business in West Virginia, adversely affecting our projects.

b. AIA contract requirements

The AIA A-401 provides additional insight into the numerous expectations and requirements for subcontractors, none of which currently apply to suppliers, but which, as discussed above, could be imposed on all suppliers by virtue of a contractor's or subcontractor's requirement that suppliers enter into subcontracts. Included in the contractual requirements that could be imposed on suppliers if they are to be deemed contractors are: 1) obligations to secure and pay for permits and governmental fees and licenses and inspections necessary for the subcontractor's work, *see* A-401 § 4.2.1; 2) potential liability to indemnify the owner, general contractor, architect, and their agents for any claim, loss or damage arising out of the performance of the subcontractor's work, *see* A-401 § 4.6.1; 3) purchasing and maintaining

insurance and filing acceptable Certificates of Insurance prior to commencing work, *see* A-401, §§ 13.1–13.3; 4) submitting all claims arising out of or related to the subcontract to mediation as a condition precedent to arbitration or litigation, *see* A-401, § 6.1.1¹¹; and 5) potential responsibility for incidental design, *see* AIA A-201, article 3.12 (requiring review and approval of shop drawings, product data, and similar submittals); *see also* A-201 § 5.3.1 (requiring subcontractor assume toward the contractor all obligations and responsibilities which the contractor assumes towards the owner and architect). Obviously, if suppliers are deemed subcontractors as a general premise, which may arise if they are so deemed for the purposes of W.Va. Code § 38-2-39, these additional contractual requirements would impose a significant burden on the construction industry and on suppliers themselves.

c. Lien waivers

One final and significantly troubling aspect of converting suppliers into subcontractors is the additional burden placed on contractors to ensure payment of all participants in the supply chain.¹² In a typical construction project, at completion, subcontractors execute lien waivers in favor of the contractor evidencing that the subcontractor has been paid by the contractor. The contractor typically must obtain these waivers before the architect will issue a final certificate of payment to the contractor. Conversely, to the extent any such waivers are required from suppliers (excluding those who may have contracted directly with the contractor or an actual

¹¹ This is a vast difference from the remedies available under the otherwise governing provisions of the Uniform Commercial Code applicable to the sale of goods. *See* W.Va. Code § 46-2-101, *et seq.* (2007).

¹² *See also*, discussion at Section B.1., *supra*.

subcontractor), obtaining the waivers is the responsibility of the subcontractor who purchased the product.

If suppliers are categorized as subcontractors, contractors will be required to obtain evidence from every participant in the supply chain, all the way to manufacturers, that each has been paid for its materials --otherwise, how can it accept bonding and other responsibilities toward them on the front end? This would vastly alter the manner in which business is currently conducted, imposing new and extraordinary burdens on contractors. Moreover, suppliers -- who typically obtain materials from multiple sources, yet deliver them to work sites in lump batches -- would be required to identify and keep track of each discrete vendor of materials within any one batch to be able to identify whether each of *these* suppliers has been paid. The never-ending cycle would likely create an environment in which few suppliers would wish to participate, especially when no such restrictions obtain in other states, potentially resulting in their refusal to deal with West Virginia contractors.

VI. Conclusion

The industry standard clearly defines a subcontractor -- a definition that excludes suppliers such as Titan, regardless of whether that supplier fabricates any portion of the materials it supplies. To deviate from that standard would change the way the construction industry does business in West Virginia in a way that would be detrimental to contractors and suppliers alike. Moreover, in that first-tier suppliers are already covered by payment bonds, there is nothing in the public works bond statute that justifies extending this coverage to potentially unlimited material suppliers and manufacturers. If that is done, the cost of all construction projects will

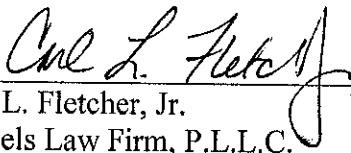
likely increase, including the costs and burdens associated with public works projects. It is not in the interests of the citizens of West Virginia for this Court to adopt a legal interpretation that would serve to increase taxpayer liability for state improvements, solely to provide a second-tier supplier a means by which to circumvent the statutory public works bonding scheme.

For these reasons, *amicus curiae* Contractors Association of West Virginia respectfully requests that this Court answer the certified question in the negative and hold that a supplier is not a subcontractor for the purposes of West Virginia Code section 38-2-39.

Respectfully submitted,

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AIA DOCUMENT A401-1997

*Standard Form of Agreement Between Contractor and Subcontractor***GENERAL INFORMATION**

PURPOSE. AIA Document A401-1997 is intended for use in establishing the contractual relationship between the Contractor and Subcontractor. This document, when completed, will adopt by reference AIA Document A201 and a pre-existing Prime Contract between the Contractor and Owner. The completed A401-1997 document will thus form an Agreement whereby the duties and responsibilities of the Contractor under the Prime Contract pass to the Subcontractor with respect to a portion of the work designated in the completed A401-1997 document.

RELATED DOCUMENTS. This document has been prepared for use with a Prime Contract which may be based upon the latest editions of one or more of the AIA A-Series documents, especially those that relate to and adopt AIA Document A201, General Conditions of the Contract for Construction. If another general conditions will be used, A401-1997 will have to be modified to refer to that general conditions instead of to AIA Document A201.

DISPUTE RESOLUTION—MEDIATION AND ARBITRATION. This document contains provisions for mediation and arbitration of claims and disputes. Mediation is a non-binding process, but is mandatory under the terms of this agreement. Arbitration is mandatory under the terms of this agreement and binding in most states and under the Federal Arbitration Act. In a minority of states, arbitration provisions relating to future disputes are not enforceable but the parties may agree to arbitrate after the dispute arises. Even in those states, under certain circumstances (for example, in a transaction involving interstate commerce), arbitration provisions may be enforceable under the Federal Arbitration Act.

The AIA does not administer dispute resolution processes. To submit disputes to mediation or arbitration or to obtain copies of the applicable mediation or arbitration rules, write to the American Arbitration Association or call (800) 778-7879. The American Arbitration Association may also be contacted at <http://www.adr.org>.

WHY USE AIA CONTRACT DOCUMENTS? AIA contract documents are the product of a consensus-building process aimed at balancing the interests of all parties on the construction project. The documents reflect actual practice, and are state-of-the-art legal documents, regularly revised to keep pace with changes in law and the construction industry. The documents are as accessible as possible, in everyday language. Finally, AIA contract documents are flexible: they are intended to be modified to fit individual projects, but in such a way that modifications are easily distinguished from the original, printed language.

For further information on AIA's approach to drafting contract documents, see AIA Document M120, Document Drafting Principles.

USE OF NON-AIA FORMS. If a combination of AIA documents and non-AIA documents is to be used, particular care must be taken to achieve consistency of language and intent among documents.

LETTER FORMS OF AGREEMENT. Letter forms of agreement are generally discouraged by the AIA, as is the performance of a part or the whole of the Work on the basis of oral agreements or understandings. The standard AIA agreement forms have been developed through more than 100 years of experience and have been tested repeatedly in the courts. In addition, the standard forms have been carefully coordinated with other AIA documents.

STANDARD FORMS. Most AIA documents published since 1906 have contained in their titles the words "Standard Form." The term "standard" is not meant to imply that a uniform set of contractual requirements is mandatory for AIA members or others in the construction industry. Rather, the AIA standard documents are intended to be used as fair and balanced baselines from which the parties can negotiate their bargains. As such, the documents have won general acceptance within the construction industry and have been uniformly interpreted by the courts. Within an industry



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INSTRUCTIONS

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EXHIBIT

spanning 50 states—each free to adopt different, and perhaps contradictory, laws affecting that industry—AIA documents form the basis for a generally consistent body of construction law.

USE OF CURRENT DOCUMENTS. Prior to using any AIA document, the user should consult an AIA component chapter or a current AIA Documents Price List to determine the current edition of each document.

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CHANGES FROM THE PREVIOUS EDITION

A401-1997 revises the 1987 edition of A401 to reflect changes made in AIA Document A201-1997. It incorporates alterations proposed by subcontractors, architects and other interested parties. The following are some of the significant changes made to the contents from the 1987 edition of A401.

ARTICLE 1: A new paragraph has been added adopting A201 by a specific reference. It is also provided that the Subcontract may be amended only by a written Modification.

ARTICLE 3: The Contractor is now required to furnish information to enable the Subcontractor to enforce mechanic's lien rights. If the Contractor makes or defends a claim against the Owner relating to the Subcontractor's Work, the Contractor must make information relating to that claim available to the Subcontractor. Time limits and information requirements are prescribed for Contractor's claims for services and materials provided to the Subcontractor.

ARTICLE 4: The Contractor has the explicit authority to reject Work of the Subcontractor. Hazardous materials provisions have been expanded to cover materials other than asbestos and PCB, and indemnification of the Subcontractor under these provisions has been broadened.

ARTICLE 6: Mediation is added as a precursor to arbitration.

ARTICLE 7: The Contractor is now permitted to terminate the Subcontract for convenience. Procedures and rights of the Subcontractor are set out for situations in which the Prime Contract is terminated for the convenience of the Owner.

ARTICLE 9: It is explicitly noted that time is of the essence of the Subcontract with respect to the obligations of both the Contractor and Subcontractor.

ARTICLE 11: In the absence of a payment bond in the full amount of the Contract Sum, payments received by the Contractor for the Subcontractor's Work are held by the Contractor for the Subcontractor. Written notice is required if the Contractor disapproves the Subcontractor's application for payment.

ARTICLE 13: On request of the Subcontractor, the Contractor is required to provide copies of property and equipment policies. To the extent required property insurance is not in effect for the full value of the Subcontractor's Work, the Subcontractor may purchase such insurance and be reimbursed by the Contractor.

ARTICLE 15: The Contractor and Subcontractor waive consequential damages (i.e., indirect damages) arising out of the Subcontract.

USING THE A401 FORM

MODIFICATIONS. Users are encouraged to consult with an attorney before completing an AIA document. Particularly with respect to contractor's licensing laws, duties imposed by building codes, interest charges, arbitration and indemnification, this document may require modification with the assistance of legal counsel to fully comply with state or local laws regulating these matters.

Generally, necessary modifications may be accomplished by writing or typing the appropriate terms in the blank spaces provided on the form or by special conditions or amendments adopted by reference. The form may also be modified by striking out language directly on the original printed form. Care must be taken in making these kinds of deletions, however. Under NO circumstances should printed language be struck out in such a way as to render it illegible (as, for example, with blocking tape, correction fluid or X's that completely obscure the text). This may raise suspicions of concealment or suggest that the completed and signed document has been tampered with. Handwritten changes should be initialed by both parties to the contract.

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INSTRUCTIONS

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Standard Form of Agreement Between Contractor and Subcontractor

AGREEMENT made as of the _____ day of _____
in the year _____
(In words, indicate day, month and year)

BETWEEN the Contractor:
(Name, address and other information)

and the Subcontractor:
(Name, address and other information)

The Contractor has made a contract for construction dated _____

With the Owner:
(Name, address and other information)

For the following Project:
(Include detailed description of Project, location and address)

which Contract is hereinafter referred to as the Prime Contract and which provides for the furnishing of labor, materials, equipment and services in connection with the construction of the Project. A copy of the Prime Contract, consisting of the Agreement Between Owner and Contractor (from which compensation amounts may be deleted) and the other Contract Documents enumerated therein has been made available to the Subcontractor.

The Architect for the Project is:
(Name, address and other information)

The Contractor and the Subcontractor agree as follows

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

This document has been approved and endorsed by the American Subcontractors Association and the Associated Specialty Contractors, Inc.



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ARTICLE 1 THE SUBCONTRACT DOCUMENTS

1.1 The Subcontract Documents consist of (1) this Agreement; (2) the Prime Contract, consisting of the Agreement between the Owner and Contractor and the other Contract Documents enumerated therein; (3) Modifications issued subsequent to the execution of the Agreement between the Owner and Contractor, whether before or after the execution of this Agreement; (4) other documents listed in Article 16 of this Agreement; and (5) Modifications to this Subcontract issued after execution of this Agreement. These form the Subcontract, and are as fully a part of the Subcontract as if attached to this Agreement or repeated herein. The Subcontract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Subcontract Documents, other than Modifications issued subsequent to the execution of this Agreement, appears in Article 16.

1.2 Except to the extent of a conflict with a specific term or condition contained in the Subcontract Documents, the General Conditions governing this Subcontract shall be the edition of AIA Document A201, General Conditions of the Contract for Construction, current as of the date of this Agreement.

1.3 The Subcontract may be amended or modified only by a Modification. The Subcontract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and the Subcontractor, (2) between the Owner and the Subcontractor, or (3) between any persons or entities other than the Contractor and Subcontractor.

1.4 The Subcontractor shall be furnished copies of the Subcontract Documents upon request, but the Contractor may charge the Subcontractor for the reasonable cost of reproduction.

ARTICLE 2 MUTUAL RIGHTS AND RESPONSIBILITIES

2.1 The Contractor and Subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that the provisions of the edition of AIA Document A201 current as of the date of this Agreement apply to this Agreement pursuant to Paragraph 1.2 and provisions of the Prime Contract apply to the Work of the Subcontractor, the Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner, under such documents, assumes toward the Contractor, and the Subcontractor shall assume toward the Contractor all obligations and responsibilities which the Contractor, under such documents, assumes toward the Owner and the Architect. The Contractor shall have the benefit of all rights, remedies and redress against the Subcontractor which the Owner, under such documents, has against the Contractor, and the Subcontractor shall have the benefit of all rights, remedies and redress against the Contractor which the Contractor, under such documents, has against the Owner, insofar as applicable to this Subcontract. Where a provision of such documents is inconsistent with a provision of this Agreement, this Agreement shall govern.

2.2 The Contractor may require the Subcontractor to enter into agreements with Sub-subcontractors performing portions of the Work of this Subcontract by which the Subcontractor and the Sub-subcontractor are mutually bound, to the extent of the Work to be performed by the Sub-subcontractor, assuming toward each other all obligations and responsibilities which the Contractor and Subcontractor assume toward each other and having the benefit of all rights, remedies and redress each against the other which the Contractor and Subcontractor have by virtue of the provisions of this Agreement.



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Subcontractor shall participate in the preparation of coordinated drawings in areas of congestion, if required by the Prime Contract, specifically noting and advising the Contractor of potential conflicts between the Work of the Subcontractor and that of the Contractor, other subcontractors or the Owner's own forces.

4.2 LAWS, PERMITS, FEES AND NOTICES

4.2.1 The Subcontractor shall give notices and comply with laws, ordinances, rules, regulations and orders of public authorities bearing on performance of the Work of this Subcontract. The Subcontractor shall secure and pay for permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Subcontractor's Work, the furnishing of which is required of the Contractor by the Prime Contract.

4.2.2 The Subcontractor shall comply with Federal, state and local tax laws, social security acts, unemployment compensation acts and workers' compensation acts insofar as applicable to the performance of this Subcontract.

4.3 SAFETY PRECAUTIONS AND PROCEDURES

4.3.1 The Subcontractor shall take reasonable safety precautions with respect to performance of this Subcontract, shall comply with safety measures initiated by the Contractor and with applicable laws, ordinances, rules, regulations and orders of public authorities for the safety of persons and property in accordance with the requirements of the Prime Contract. The Subcontractor shall report to the Contractor within three days an injury to an employee or agent of the Subcontractor which occurred at the site.

4.3.2 If hazardous substances of a type of which an employer is required by law to notify its employees are being used on the site by the Subcontractor, the Subcontractor's Sub-subcontractors or anyone directly or indirectly employed by them, the Subcontractor shall, prior to harmful exposure of any employees on the site to such substance, give written notice of the chemical composition thereof to the Contractor in sufficient detail and time to permit compliance with such laws by the Contractor, other subcontractors and other employers on the site.

4.3.3 If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Subcontractor, the Subcontractor shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Contractor in writing. When the material or substance has been rendered harmless, the Subcontractor's Work in the affected area shall resume upon written agreement of the Contractor and Subcontractor. The Subcontract Time shall be extended appropriately and the Subcontract Sum shall be increased in the amount of the Subcontractor's reasonable additional costs of demobilization, delay and remobilization, which adjustments shall be accomplished as provided in Article 5 of this Agreement.

4.3.4 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Subcontractor, the Subcontractor's Sub-subcontractors, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Subparagraph 4.3.3 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom and provided that such damage, loss or expense is not due to the sole negligence of a party seeking indemnity.



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4.4 CLEANING UP

4.4.1 The Subcontractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations performed under this Subcontract. The Subcontractor shall not be held responsible for unclean conditions caused by other contractors or subcontractors.

4.4.2 As provided under Subparagraph 3.3.2, if the Subcontractor fails to clean up as provided in the Subcontract Documents, the Contractor may charge the Subcontractor for the Subcontractor's appropriate share of cleanup costs.

4.5 WARRANTY

4.5.1 The Subcontractor warrants to the Owner, Architect and Contractor that materials and equipment furnished under this Subcontract will be of good quality and new unless otherwise required or permitted by the Subcontract Documents, that the Work of this Subcontract will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Subcontract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Subcontractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Subcontractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. This warranty shall be in addition to and not in limitation of any other warranty or remedy required by law or by the Subcontract Documents.

4.6 INDEMNIFICATION

4.6.1 To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 4.6.

4.6.2 In claims against any person or entity indemnified under this Paragraph 4.6 by an employee of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Subparagraph 4.6.1 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor or the Subcontractor's Sub-subcontractors under workers' compensation acts, disability benefit acts or other employee benefit acts.

4.7 REMEDIES FOR NONPAYMENT

4.7.1 If the Contractor does not pay the Subcontractor through no fault of the Subcontractor, within seven days from the time payment should be made as provided in this Agreement, the Subcontractor may, without prejudice to any other available remedies, upon seven additional days' written notice to the Contractor, stop the Work of this Subcontract until payment of the amount owing has been received. The Subcontract Sum shall, by appropriate adjustment, be increased by the amount of the Subcontractor's reasonable costs of demobilization, delay and remobilization.



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ARTICLE 5 CHANGES IN THE WORK

5.1 The Owner may make changes in the Work by issuing Modifications to the Prime Contract. Upon receipt of such a Modification issued subsequent to the execution of the Subcontract Agreement, the Contractor shall promptly notify the Subcontractor of the Modification. Unless otherwise directed by the Contractor, the Subcontractor shall not thereafter order materials or perform Work which would be inconsistent with the changes made by the Modifications to the Prime Contract.

5.2 The Subcontractor may be ordered in writing by the Contractor, without invalidating this Subcontract, to make changes in the Work within the general scope of this Subcontract consisting of additions, deletions or other revisions, including those required by Modifications to the Prime Contract issued subsequent to the execution of this Agreement, the Subcontract Sum and the Subcontract Time being adjusted accordingly. The Subcontractor, prior to the commencement of such changed or revised Work, shall submit promptly to the Contractor written copies of a claim for adjustment to the Subcontract Sum and Subcontract Time for such revised Work in a manner consistent with requirements of the Subcontract Documents.

5.3 The Subcontractor shall make all claims promptly to the Contractor for additional cost, extensions of time and damages for delays or other causes in accordance with the Subcontract Documents. A claim which will affect or become part of a claim which the Contractor is required to make under the Prime Contract within a specified time period or in a specified manner shall be made in sufficient time to permit the Contractor to satisfy the requirements of the Prime Contract. Such claims shall be received by the Contractor not less than two working days preceding the time by which the Contractor's claim must be made. Failure of the Subcontractor to make such a timely claim shall bind the Subcontractor to the same consequences as those to which the Contractor is bound.

ARTICLE 6 MEDIATION AND ARBITRATION

6.1 MEDIATION

6.1.1 Any claim arising out of or related to this Subcontract, except claims as otherwise provided in Subparagraph 4.1.5 and except those waived in this Subcontract, shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.

6.1.2 The parties shall endeavor to resolve their claims by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to this Subcontract and the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

6.1.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

6.2 ARBITRATION

6.2.1 Any claim arising out of or related to this Subcontract, except claims as otherwise provided in Subparagraph 4.1.5 and except those waived in this Subcontract, shall be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Paragraph 6.1.



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Prime Contract for the Subcontractor's Work prior to the completion of the entire Project. If the Prime Contract does not allow for a full release of retainage, then such payment shall be an amount which, when added to previous payments to the Subcontractor, will reduce the retainage on the Subcontractor's substantially completed Work to the same percentage of retainage as that on the Contractor's Work covered by the certificate.

ARTICLE 12 FINAL PAYMENT

12.1 Final payment, constituting the entire unpaid balance of the Subcontract Sum, shall be made by the Contractor to the Subcontractor when the Subcontractor's Work is fully performed in accordance with the requirements of the Subcontract Documents, the Architect has issued a certificate for payment covering the Subcontractor's completed Work and the Contractor has received payment from the Owner. If, for any cause which is not the fault of the Subcontractor, a certificate for payment is not issued or the Contractor does not receive timely payment or does not pay the Subcontractor within three working days after receipt of payment from the Owner, final payment to the Subcontractor shall be made upon demand.
(Insert provisions for earlier final payment to the Subcontractor, if applicable.)

12.2 Before issuance of the final payment, the Subcontractor, if required, shall submit evidence satisfactory to the Contractor that all payrolls, bills for materials and equipment, and all known indebtedness connected with the Subcontractor's Work have been satisfied.

ARTICLE 13 INSURANCE AND BONDS

13.1 The Subcontractor shall purchase and maintain insurance of the following types of coverage and limits of liability:

13.2 Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from date of commencement of the Subcontractor's Work until date of final payment and termination of any coverage required to be maintained after final payment to the Subcontractor.

13.3 Certificates of insurance acceptable to the Contractor shall be filed with the Contractor prior to commencement of the Subcontractor's Work. These certificates and the insurance policies required by this Article 13 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Contractor. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final application for payment as required in Article 12. If any information concerning reduction of coverage is not furnished by the insurer, it shall be furnished by the Subcontractor with reasonable promptness according to the Subcontractor's information and belief.



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General Conditions of the Contract for Construction

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This document has been approved and endorsed by The Associated General Contractors of America.



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3.9 SUPERINTENDENT

3.9.1 The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor. Important communications shall be confirmed in writing. Other communications shall be similarly confirmed on written request in each case.

3.10 CONTRACTOR'S CONSTRUCTION SCHEDULES

3.10.1 The Contractor, promptly after being awarded the Contract, shall prepare and submit for the Owner's and Architect's information a Contractor's construction schedule for the Work. The schedule shall not exceed time limits current under the Contract Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work.

3.10.2 The Contractor shall prepare and keep current, for the Architect's approval, a schedule of submittals which is coordinated with the Contractor's construction schedule and allows the Architect reasonable time to review submittals.

3.10.3 The Contractor shall perform the Work in general accordance with the most recent schedules submitted to the Owner and Architect.

3.11 DOCUMENTS AND SAMPLES AT THE SITE

3.11.1 The Contractor shall maintain at the site for the Owner one record copy of the Drawings, Specifications, Addenda, Change Orders and other Modifications, in good order and marked currently to record field changes and selections made during construction, and one record copy of approved Shop Drawings, Product Data, Samples and similar required submittals. These shall be available to the Architect and shall be delivered to the Architect for submittal to the Owner upon completion of the Work.

3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES

3.12.1 Shop Drawings are drawings, diagrams, schedules and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work.

3.12.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work.

3.12.3 Samples are physical examples which illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.

3.12.4 Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents. The purpose of their submittal is to demonstrate for those portions of the Work for which submittals are required by the Contract Documents the way by which the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents. Review by the Architect is subject to the limitations of Subparagraph 4.2.7. Informational submittals upon which the Architect is not expected to take responsive action may be so identified in the Contract Documents. Submittals which are not required by the Contract Documents may be returned by the Architect without action.

3.12.5 The Contractor shall review for compliance with the Contract Documents, approve and submit to the Architect Shop Drawings, Product Data, Samples and similar submittals required by



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the Contract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of separate contractors. Submittals which are not marked as reviewed for compliance with the Contract Documents and approved by the Contractor may be returned by the Architect without action.

3.12.6 By approving and submitting Shop Drawings, Product Data, Samples and similar submittals, the Contractor represents that the Contractor has determined and verified materials, field measurements and field construction criteria related thereto, or will do so, and has checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

3.12.7 The Contractor shall perform no portion of the Work for which the Contract Documents require submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the respective submittal has been approved by the Architect.

3.12.8 The Work shall be in accordance with approved submittals except that the Contractor shall not be relieved of responsibility for deviations from requirements of the Contract Documents by the Architect's approval of Shop Drawings, Product Data, Samples or similar submittals unless the Contractor has specifically informed the Architect in writing of such deviation at the time of submittal and (1) the Architect has given written approval to the specific deviation as a minor change in the Work, or (2) a Change Order or Construction Change Directive has been issued authorizing the deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples or similar submittals by the Architect's approval thereof.

3.12.9 The Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples or similar submittals, to revisions other than those requested by the Architect on previous submittals. In the absence of such written notice the Architect's approval of a resubmission shall not apply to such revisions.

3.12.10 The Contractor shall not be required to provide professional services which constitute the practice of architecture or engineering unless such services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to provide such services in order to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences and procedures. The Contractor shall not be required to provide professional services in violation of applicable law. If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. The Contractor shall cause such services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by such professional. Shop Drawings and other submittals related to the Work designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to the Architect. The Owner and the Architect shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such design professionals, provided the Owner and Architect have specified to the Contractor all performance and design criteria that such services must satisfy. Pursuant to this Subparagraph 3.12.10, the Architect will review, approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Contractor shall not be responsible for the adequacy of the performance or design criteria required by the Contract Documents.



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4.6.5 Claims and Timely Assertion of Claims. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

4.6.6 Judgment on Final Award. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

ARTICLE 5 SUBCONTRACTORS

5.1 DEFINITIONS

5.1.1 A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" does not include a separate contractor or subcontractors of a separate contractor.

5.1.2 A Sub-subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the site. The term "Sub-subcontractor" is referred to throughout the Contract Documents as if singular in number, and means a Sub-subcontractor or an authorized representative of the Sub-subcontractor.

5.2 AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK

5.2.1 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Architect will promptly reply to the Contractor in writing stating whether or not the Owner or the Architect, after due investigation, has reasonable objection to any such proposed person or entity. Failure of the Owner or Architect to reply promptly shall constitute notice of no reasonable objection.

5.2.2 The Contractor shall not contract with a proposed person or entity to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

5.2.3 If the Owner or Architect has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom the Owner or Architect has no reasonable objection. If the proposed but rejected Subcontractor was reasonably capable of performing the Work, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute Subcontractor's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.

5.2.4 The Contractor shall not change a Subcontractor, person or entity previously selected if the Owner or Architect makes reasonable objection to such substitute.

5.3 SUBCONTRACTUAL RELATIONS

5.3.1 By appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the



Subcontractor's Work, which the Contractor, by these Documents, assumes toward the Owner and Architect. Each subcontract agreement shall preserve and protect the rights of the Owner and Architect under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement which may be at variance with the Contract Documents. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors.

5.4 CONTINGENT ASSIGNMENT OF SUBCONTRACTS

5.4.1 Each subcontract agreement for a portion of the Work is assigned by the Contractor to the Owner provided that:

- 1 assignment is effective only after termination of the Contract by the Owner for cause pursuant to Paragraph 14.2 and only for those subcontract agreements which the Owner accepts by notifying the Subcontractor and Contractor in writing; and
- 2 assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

5.4.2 Upon such assignment, if the Work has been suspended for more than 30 days, the Subcontractor's compensation shall be equitably adjusted for increases in cost resulting from the suspension.

ARTICLE 6 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

6.1 OWNER'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS

6.1.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under Conditions of the Contract identical or substantially similar to these including those portions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such Claim as provided in Paragraph 4.3.

6.1.2 When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Contractor" in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement.

6.1.3 The Owner shall provide for coordination of the activities of the Owner's own forces and of each separate contractor with the Work of the Contractor who shall cooperate with them. The Contractor shall participate with other separate contractors and the Owner in reviewing their construction schedules when directed to do so. The Contractor shall make any revisions to the construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Contractor, separate contractors and the Owner until subsequently revised.

6.1.4 Unless otherwise provided in the Contract Documents, when the Owner performs construction or operations related to the Project with the Owner's own forces, the Owner shall be deemed to be subject to the same obligations and to have the same rights which apply to the



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GENERAL CONDITIONS
OF THE CONTRACT FOR
CONSTRUCTION

The American Institute
of Architects
1735 New York Avenue, N.W.
Washington, D.C. 20006-5292

This document has important legal consequences; consultation with an attorney is encouraged with respect to its use or modification. This document should be adapted to the particular circumstances of the contemplated Project and the governing Law.

STANDARD GENERAL CONDITIONS OF THE CONSTRUCTION CONTRACT

Prepared by

ENGINEERS JOINT CONTRACT DOCUMENTS COMMITTEE

and

Issued and Published Jointly By

[INSERT LOGOS]

PROFESSIONAL ENGINEERS IN PRIVATE PRACTICE
a practice division of the
NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS

AMERICAN CONSULTING ENGINEERS COUNCIL

AMERICAN SOCIETY OF CIVIL ENGINEERS

This document has been approved and endorsed by

The Associated General [seal] Contractors of America

Construction Specifications Institute

[seal]

General Conditions have been prepared for use with the Owner-Contractor Agreements (No. 1910-8-A-1 or 1910-8-1996 Editions). Their provisions are interrelated and a change in one may necessitate a change in the other. Provisions concerning their usage are contained in the EJCDC User's Guide (No. 1910-50). For guidance in the preparation of Supplementary Conditions, see Guide to the Preparation of Supplementary Conditions (No. 1910-17) (1996 Edition).

No. 1910-8 (1996 Edition)

GENERAL CONDITIONS

ARTICLE 1 - DEFINITIONS AND TERMINOLOGY

1.01 *Defined Terms*

A. Wherever used in the Contract Documents and printed with initial or all capital letters, the terms listed below will have the meanings indicated which are applicable to both the singular and plural thereof.

1. *Addenda*—Written or graphic instruments issued prior to the opening of Bids which clarify, correct, or change the Bidding Requirements or the Contract Documents.

2. *Agreement*—The written instrument which is evidence of the agreement between OWNER and CONTRACTOR covering the Work.

3. *Application for Payment*—The form acceptable to ENGINEER which is to be used by CONTRACTOR during the course of the Work in requesting progress or final payments and which is to be accompanied by such supporting documentation as is required by the Contract Documents.

4. *Asbestos*—Any material that contains more than one percent asbestos and is friable or is releasing asbestos fibers into the air above current action levels established by the United States Occupational Safety and Health Administration.

5. *Bid*—The offer or proposal of a bidder submitted on the prescribed form setting forth the prices for the Work to be performed.

6. *Bidding Documents*—The Bidding Requirements and the proposed Contract Documents (including all Addenda issued prior to receipt of Bids).

7. *Bidding Requirements*—The Advertisement or Invitation to Bid, Instructions to Bidders, Bid security form, if any, and the Bid form with any supplements.

8. *Bonds*—Performance and payment bonds and other instruments of security.

9. *Change Order*—A document recommended by ENGINEER which is signed by CONTRACTOR and OWNER and authorizes an addition, deletion, or revision in the Work or an adjustment in the Contract Price or the

Contract Times, issued on or after the Effective Date of the Agreement.

10. *Claim*—A demand or assertion by OWNER or CONTRACTOR seeking an adjustment of Contract Price or Contract Times, or both, or other relief with respect to the terms of the Contract. A demand for money or services by a third party is not a Claim.

11. *Contract*—The entire and integrated written agreement between the OWNER and CONTRACTOR concerning the Work. The Contract supersedes prior negotiations, representations, or agreements, whether written or oral.

12. *Contract Documents*—The Contract Documents establish the rights and obligations of the parties and include the Agreement, Addenda (which pertain to the Contract Documents), CONTRACTOR's Bid (including documentation accompanying the Bid and any post Bid documentation submitted prior to the Notice of Award) when attached as an exhibit to the Agreement, the Notice to Proceed, the Bonds, these General Conditions, the Supplementary Conditions, the Specifications and the Drawings as the same are more specifically identified in the Agreement, together with all Written Amendments, Change Orders, Work Change Directives, Field Orders, and ENGINEER's written interpretations and clarifications issued on or after the Effective Date of the Agreement. Approved Shop Drawings and the reports and drawings of subsurface and physical conditions are not Contract Documents. Only printed or hard copies of the items listed in this paragraph are Contract Documents. Files in electronic media format of text, data, graphics, and the like that may be furnished by OWNER to CONTRACTOR are not Contract Documents.

13. *Contract Price*—The moneys payable by OWNER to CONTRACTOR for completion of the Work in accordance with the Contract Documents as stated in the Agreement (subject to the provisions of paragraph 11.03 in the case of Unit Price Work).

14. *Contract Times*—The number of days or the dates stated in the Agreement to: (i) achieve Substantial Completion; and (ii) complete the Work so that it is ready for final payment as evidenced by ENGINEER's written recommendation of final payment.

15. *CONTRACTOR*—The individual or entity with whom OWNER has entered into the Agreement.

16. *Cost of the Work*--See paragraph 11.01.A for definition.

17. *Drawings*--That part of the Contract Documents prepared or approved by ENGINEER which graphically shows the scope, extent, and character of the Work to be performed by CONTRACTOR. Shop Drawings and other CONTRACTOR submittals are not Drawings as so defined.

18. *Effective Date of the Agreement*--The date indicated in the Agreement on which it becomes effective, but if no such date is indicated, it means the date on which the Agreement is signed and delivered by the last of the two parties to sign and deliver.

19. *ENGINEER*--The individual or entity named as such in the Agreement.

20. *ENGINEER's Consultant*--An individual or entity having a contract with ENGINEER to furnish services as ENGINEER's independent professional associate or consultant with respect to the Project and who is identified as such in the Supplementary Conditions.

21. *Field Order*--A written order issued by ENGINEER which requires minor changes in the Work but which does not involve a change in the Contract Price or the Contract Times.

22. *General Requirements*--Sections of Division 1 of the Specifications. The General Requirements pertain to all sections of the Specifications.

23. *Hazardous Environmental Condition*--The presence at the Site of Asbestos, PCBs, Petroleum, Hazardous Waste, or Radioactive Material in such quantities or circumstances that may present a substantial danger to persons or property exposed thereto in connection with the Work.

24. *Hazardous Waste*--The term Hazardous Waste shall have the meaning provided in Section 1004 of the Solid Waste Disposal Act (42 USC Section 6903) as amended from time to time.

25. *Laws and Regulations; Laws or Regulations*--Any and all applicable laws, rules, regulations, ordinances, codes, and orders of any and all governmental bodies, agencies, authorities, and courts having jurisdiction.

26. *Liens*--Charges, security interests, or encumbrances upon Project funds, real property, or personal property.

27. *Milestones*--A principal event specified in the Contract Documents relating to an intermediate completion date or time prior to Substantial Completion of all the Work.

28. *Notice of Award*--The written notice by OWNER to the apparent successful bidder stating that upon timely compliance by the apparent successful bidder with the conditions precedent listed therein, OWNER will sign and deliver the Agreement.

29. *Notice to Proceed*--A written notice given by OWNER to CONTRACTOR fixing the date on which the Contract Times will commence to run and on which CONTRACTOR shall start to perform the Work under the Contract Documents.

30. *OWNER*--The individual, entity, public body, or authority with whom CONTRACTOR has entered into the Agreement and for whom the Work is to be performed.

31. *Partial Utilization*--Use by OWNER of a substantially completed part of the Work for the purpose for which it is intended (or a related purpose) prior to Substantial Completion of all the Work.

32. *PCBs*--Polychlorinated biphenyls.

33. *Petroleum*--Petroleum, including crude oil or any fraction thereof which is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute), such as oil, petroleum, fuel oil, oil sludge, oil refuse, gasoline, kerosene, and oil mixed with other non-Hazardous Waste and crude oils.

34. *Project*--The total construction of which the Work to be performed under the Contract Documents may be the whole, or a part as may be indicated elsewhere in the Contract Documents.

35. *Project Manual*--The bound documentary information prepared for bidding and constructing the Work. A listing of the contents of the Project Manual, which may be bound in one or more volumes, is contained in the table(s) of contents.

36. *Radioactive Material*--Source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954 (42 USC Section 2011 et seq.) as amended from time to time.

37. *Resident Project Representative*--The authorized representative of ENGINEER who may be assigned to the Site or any part thereof.

38. *Samples*--Physical examples of materials, equipment, or workmanship that are representative of some portion of the Work and which establish the standards by which such portion of the Work will be judged.

39. *Shop Drawings*--All drawings, diagrams, illustrations, schedules, and other data or information which are specifically prepared or assembled by or for CONTRACTOR and submitted by CONTRACTOR to illustrate some portion of the Work.

40. *Site*--Lands or areas indicated in the Contract Documents as being furnished by OWNER upon which the Work is to be performed, including rights-of-way and easements for access thereto, and such other lands furnished by OWNER which are designated for the use of CONTRACTOR.

41. *Specifications*--That part of the Contract Documents consisting of written technical descriptions of materials, equipment, systems, standards, and workmanship as applied to the Work and certain administrative details applicable thereto.

42. *Subcontractor*--An individual or entity having a direct contract with CONTRACTOR or with any other Subcontractor for the performance of a part of the Work at the Site.

43. *Substantial Completion*--The time at which the Work (or a specified part thereof) has progressed to the point where, in the opinion of ENGINEER, the Work (or a specified part thereof) is sufficiently complete, in accordance with the Contract Documents, so that the Work (or a specified part thereof) can be utilized for the purposes for which it is intended. The terms "substantially complete" and "substantially completed" as applied to all or part of the Work refer to Substantial Completion thereof.

44. *Supplementary Conditions*--That part of the Contract Documents which amends or supplements these General Conditions.

45. *Supplier*--A manufacturer, fabricator, supplier, distributor, materialman, or vendor having a direct contract with CONTRACTOR or with any Subcontractor to furnish materials or equipment to be incorporated in the Work by CONTRACTOR or any Subcontractor.

46. *Underground Facilities*--All underground pipelines, conduits, ducts, cables, wires, manholes, vaults, tanks, tunnels, or other such facilities or attachments, and any encasements containing such facilities, including those that convey electricity, gases, steam, liquid petroleum products, telephone or other communications, cable

television, water, wastewater, storm water, other liquids or chemicals, or traffic or other control systems.

47. *Unit Price Work*--Work to be paid for on the basis of unit prices.

48. *Work*--The entire completed construction or the various separately identifiable parts thereof required to be provided under the Contract Documents. Work includes and is the result of performing or providing all labor, services, and documentation necessary to produce such construction, and furnishing, installing, and incorporating all materials and equipment into such construction, all as required by the Contract Documents.

49. *Work Change Directive*--A written statement to CONTRACTOR issued on or after the Effective Date of the Agreement and signed by OWNER and recommended by ENGINEER ordering an addition, deletion, or revision in the Work, or responding to differing or unforeseen subsurface or physical conditions under which the Work is to be performed or to emergencies. A Work Change Directive will not change the Contract Price or the Contract Times but is evidence that the parties expect that the change ordered or documented by a Work Change Directive will be incorporated in a subsequently issued Change Order following negotiations by the parties as to its effect, if any, on the Contract Price or Contract Times.

50. *Written Amendment*--A written statement modifying the Contract Documents, signed by OWNER and CONTRACTOR on or after the Effective Date of the Agreement and normally dealing with the nonengineering or nontechnical rather than strictly construction-related aspects of the Contract Documents.

1.02 Terminology

A. Intent of Certain Terms or Adjectives

1. Whenever in the Contract Documents the terms "as allowed," "as approved," or terms of like effect or import are used, or the adjectives "reasonable," "suitable," "acceptable," "proper," "satisfactory," or adjectives of like effect or import are used to describe an action or determination of ENGINEER as to the Work, it is intended that such action or determination will be solely to evaluate, in general, the completed Work for compliance with the requirements of and information in the Contract Documents and conformance with the design concept of the completed Project as a functioning whole as shown or indicated in the Contract Documents (unless there is a specific statement indicating otherwise). The use of any such term or adjective shall not be effective to assign to ENGINEER

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**PREUSSAG INTERNATIONAL STEEL
CORPORATION, d/b/a INFRA-METALS, CO.**

vs.

**MARCH-WESTIN CO., INC.; TITAN FABRICATION &
CONSTRUCTION, INC.; ZURICH AMERICAN INSURANCE CO.;
and FIDELITY AND DEPOSIT COMPANY OF MARYLAND**

Supreme Court No. 33286

CERTIFICATE OF SERVICE

I, Carl L. Fletcher, Jr., do hereby certify that I served the foregoing **"Motion for Leave to File Brief as an Amicus Curiae"** with attached **"Brief Amicus Curiae of The Contractors Association of West Virginia in Support of Defendant March-Westin Co., Inc."** upon the following, by mailing a copy thereof to each by United States Postal Service or by other indicated express delivery service, postage prepaid, this 22nd day of March, 2007.

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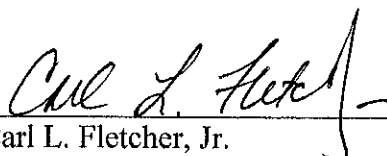
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